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No. 97-369

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, et al.,

Petitioners,

v.

PETE WILSON, Governor of the State of California, in his official capacity, et al.,

Respondents,

and

CALIFORNIANS AGAINST DISCRIMINATION AND PREFERENCES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

1. Under *Hunter v. Erickson*, 393 U.S. 385 (1969) and *Washington v. Seattle School District, No. 1*, 458 U.S. 457 (1982), does the Fourteenth Amendment's prohibition of racial and gender-based discrimination by states prevent states from prohibiting racial and gender-based discrimination?

2. Do "minorities" and women have a unique equal protection right, enjoyed by no others, to veto state measures mandating nondiscrimination for others and to seek enactment of local measures mandating discrimination against others?

3. Does *Romer v. Evans*, 116 S. Ct. 1620 (1996), prohibit states from granting nonminorities and men the same protection from discrimination granted to minorities and women?

4. Does Title VII preempt laws that are consistent with its substantive commands and that promote the policies of nondiscrimination that it embodies solely because they are enacted at the state, rather than local, level?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Californians Against Discrimination and Preferences, Inc., certifies that it has no parent company, non-wholly owned subsidiaries, or affiliates that have issued shares to the public.

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STATEMENT OF THE CASE

On November 5, 1996, the people of California reaffirmed their commitment to the principles of racial equality and nondiscrimination by ratifying Proposition 209, which is now Article I, Section 31 of the California Constitution. The measure provides in relevant part that:

> The state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.

Despite the obvious symmetry between Proposition 209 and the Equal Protection Clause, the district court entered a preliminary injunction on the ground that petitioners had demonstrated a probability of success on the merits of their facial challenge to Proposition 209 under the Fourteenth Amendment. As a threshold matter, the court acknowledged that it is clear under *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), that governmental entities may "voluntarily repeal affirmative action policies. . . . " App. B11, App. B45. Nevertheless, the court concluded that, under *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), Proposition 209 violated the Equal Protection Clause. Specifically, the district court held that Proposition 209 embodied a "racial classification," since the amendment "single[d] out an issue of special interest to minorities." App. B46. The court also held that Proposition 209 "nonneutrally reorder[ed] the political process to burden the interests of minorities or women." App. B61. The district court rested its conclusion, in part, on the fact that Proposition 209 eliminated only racial and gender preferences while allowing other groups to seek preferential treatment for veterans, the disabled, athletes, and artists. App. B30, B48.[1]

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[1] The district court also based its grant of a preliminary injunction on the alternative ground that Title VII of the Civil Rights Act of 1964 preempts Proposition 209. The court rejected petitioners' claim that Title

The Ninth Circuit reversed and vacated the district court's preliminary injunction. The court began its analysis by noting the well-established principle that the "standard of review under the Equal Protection Clause does not depend on the race or gender of those burdened or benefited by a particular classification." App. A19 (quoting *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (plurality opinion)). The court noted that petitioners' claim, when reduced to its essence, was that Proposition 209's "ban on unequal treatment denies members of certain races and one gender equal protection of the laws." App. A19. The court concluded, however, that "[a] law that prohibits the State from classifying individuals by race or gender *a fortiori* does not classify individuals by race or gender" and thus does not violate the Constitution as a matter of "conventional" equal protection analysis. App. A21.

The Ninth Circuit also rejected petitioners' argument that Proposition 209 imposes an unequal "political structure" on women and minorities who seek preferential treatment from the lowest level of government. App. A21. In considering the applicability of *Seattle*, the Ninth Circuit noted that "[t]he *Seattle* majority specifically allayed any concern that its holding rendered the state powerless to address racial issues where localities acted first." App. A32 (citing *Seattle*, 458 U.S. at 480 n.23.). Furthermore, the court held that Proposition 209 does not contain any racial classifications and does not reorder the political structure of state or local government. Instead, the court concluded that Proposition 209 "addresses in neutral-fashion race-related and gender-related matters." App. A33. Finally, the Ninth Circuit observed that

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VI and Title IX preempt Proposition 209. Moreover, the court recognized that there is no actual conflict between Title VII and Proposition 209 and that the federal government has not "occupied the field" in the civil rights area. Nevertheless, the court held that the amendment frustrated Title VII's objectives of encouraging affirmative action. App. B69-B72, App. B75-B77. Accordingly, the court held that Proposition 209 was inconsistent with the goals of Title VII and thus preempted.

" 'it would be paradoxical to conclude that by adopting the Equal Protection Clause of the Fourteenth Amendment, the voters of the State thereby had violated it.' " App. A38 (quoting *Crawford*, 458 U.S. at 535).[2]

Petitioners filed a petition for rehearing and suggestion for rehearing *en banc*, which the full Ninth Circuit rejected with four judges dissenting. Subsequently, both the Ninth Circuit and this Court rejected petitioners' motion for a stay of the mandate.

REASONS FOR DENYING THE WRIT

The decision below does not warrant this Court's plenary review under the traditional criteria. No opinion by any federal or state court conflicts with the Ninth Circuit's decision.[3] Moreover, no prohibitions analogous to Proposition 209 have been enacted, much less adjudicated. More generally, while Proposition 209 implicates an important and controversial public policy issue, the Ninth Circuit's affirmance of Proposition 209's constitutionality does not entail any significant *legal* issues or conflict with any decision by this Court, but is simply a straightforward application of bedrock equal protection principles and binding precedent.

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[2] Citing the express preemption provisions of the 1964 Civil Rights Act, the Ninth Circuit also rejected petitioners' contention that Proposition 209 impermissibly interferes with the requirements and purposes of Title VII.

[3] The only federal case which has previously considered the constitutionality of a state law forbidding local affirmative action racial preferences is *Associated Gen. Contractors v. San Francisco Unified School Dist.*, 616 F.2d 1381, 1388 (9th Cir.), *cert. denied*, 449 U.S. 1061 (1980), where, in upholding the measure, the Ninth Circuit stressed that it could not so "remove the question from the legislative sphere without grossly overstepping the appropriate limits of the judiciary in the American system." *See also Louisiana Associated Gen. Contractors, Inc. v. State of Louisiana*, 669 So.2d 1185, 1199 (La. 1996) (holding that the state constitution expressly banned all racial discrimination, including minority preference programs, and concluding that "although a state has the authority to participate in race preference programs under the Fourteenth Amendment that same provision does not mandate that it do so").

Proposition 209 simply forbids official conduct discriminating on the basis of race.[4] Paradoxically, petitioners argue that this prohibition facially violates the Fourteenth Amendment, although that Amendment's " 'central purpose . . . is the prevention of official conduct discriminating on the basis of race.' " *Seattle*, 457 U.S. at 484 (quoting *Washington v. Davis*, 426 U.S. 229, 239 (1976)). Thus, under petitioners' Orwellian interpretation of this Court's precedent, the federal constitutional provision prohibiting a "State" from racially discriminating prohibits a "State" from ending racial discrimination. U.S. Const. amend. XIV. (No "State". . . .)

To be sure, the Fourteenth Amendment *permits* racial discrimination if the government can affirmatively demonstrate that it is narrowly tailored to achieve a compelling governmental interest. But the Fourteenth Amendment concededly and obviously does "not *require* what it barely permits." App. A38 (emphasis added).[5] Thus, the substantive

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[4] While petitioners challenge application of Proposition 209 even to *state* programs and *gender preferences*, we will focus more directly on their criticism of Proposition 209's effect on local racial preferences, since this is allegedly the most obvious defect.

[5] Although the district court found, App. B62, and petitioners *sometimes* concede, that the Fourteenth Amendment does not *require* racially preferential treatment, petitioners now also seem to be schizophrenically maintaining that there is a "constitutional obligation" to employ racial preferences. *Compare* Pet.16, 24, 25 *with* Pet. 9, 10, 15. But the Constitution most assuredly does not "require what it barely permits" and petitioners can cite *no* support for the extraordinary proposition that any individual has a Fourteenth Amendment *right* to preferential treatment because others of his race have been discriminated against. No Justice has ever suggested as much and every lower court presented with such an argument has rejected it out of hand. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 379 (1978) (Brennan, J., dissenting) (California University "is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program."); *Austin Black Contractors Ass'n v. City of Austin*, 78 F.3d 185, 186 (5th Cir. 1996) ("we join the numerous other circuits that have previously determined that the Fourteenth Amendment does not require affirmative action"). To be

command of Proposition 209 is fully consistent with the substantive command of the Fourteenth Amendment. Petitioners nevertheless insist that, although racial neutrality fully

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sure, "a city *could* act . . . by taking appropriate measures," including racial preferences, when "necessary to break down patterns of deliberate exclusion." *Croson*, 488 U.S. at 509 (emphasis added). *See also id.* ("Nothing we say today *precludes* a state or local entity from taking action to rectify the effects of identified discrimination within its jurisdiction.") (emphasis added); *Adarand Constructors v. Pena*, 515 U.S. 200, 237 (1995) ("government is *not disqualified* from acting in response to [racial discrimination].") (emphasis added). It is equally true that "the State . . . has the absolute duty" to remedy its own discrimination. *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). But, as the Ninth Circuit correctly noted, petitioners cannot distort the independent propositions that the State *may* sometimes use racial preferences when "necessary" and *must* correct its intentional discrimination into the very different proposition that the State *must* use racial preferences to correct its prior discrimination. Pet. App. A15 n.7. Rather, such discrimination can be fully remedied by prospectively eliminating the discriminatory policies and, retrospectively, "must be designed as nearly as possible 'to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' " *Shaw v. Hunt*, 116 S. Ct. 1894, 1905 (1996) (quoting *Missouri v. Jenkins*, 515 U.S. 70, 98 (1995)). *See also Missouri v. Jenkins*, 515 U.S. 70, 109 (1995) (O'Connor, J., concurring) ("School desegregation remedies are intended, 'as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct.' ") (quoting *Milliken v. Bradley*, 418 U.S. 717, 746 (1974))). But no court has ever suggested that a *nonvictim* of discrimination has some Fourteenth Amendment right to racially preferential treatment from a local government by virtue of his group membership, regardless of whether a federal court is *permitted* under the Fifth Amendment's equal protection guarantees to order such racial preferences. While the Court has twice held that court-ordered preferences do not *violate* the equal protection restrictions on federal courts, and a state legislative preference would presumably be permissible in the same circumstances, there is absolutely no support (and none is cited), for petitioners' novel suggestion that legislatures have a *duty* to enact such preferences when a court *could* order such a remedy. *See United States v. Paradise*, 480 U.S. 149, 184 (1987); *Local 28 of Sheet Metal Workers v. E.E.O.C.*, 478 U.S. 421, 475 (1986).

complies with the substantive constraints that the Fourteenth Amendment places on the "State," racial neutrality affirmatively violates the substantive constraints of the Fourteenth Amendment if it is enacted by the "State." If, for example, both the State of California and the City of San Francisco enacted precisely the same race-neutral substantive policy, the City's would be constitutionally unobjectionable, but the State's somehow becomes converted into a "racial classification" that unconstitutionally excludes minorities from the political process.

Thus, petitioners' entire case is premised on the extraordinary and unprecedented notion that the Fourteenth Amendment is not just a floor of nondiscrimination below which no state may descend, but is also a ceiling establishing the maximum permissible scope of nondiscrimination above which no state may ascend. Even here, petitioners are forced to concede that, *as a general matter*, state constitutions may grant rights and protections that enhance and go beyond all federal constitutional protections. *Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74, 81 (1980) (A state is entirely free to "exercise its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."). This principle applies to the Fourteenth Amendment's equal protection guarantees just as it does to all other constitutional guarantees. Thus, although the Fourteenth Amendment permits gender-based discrimination which satisfies "intermediate scrutiny," state constitutions may go further and eliminate *all* public gender-based discrimination through Equal Rights Amendments and the like. Similarly, while the Fourteenth Amendment prohibits only *intentional* racial discrimination, states may go further and prohibit conduct having a "disparate impact" along racial lines, just as states were obviously free to voluntarily prohibit local racially-segregated schools at a time when the Fourteenth Amendment permitted such a "separate but equal" regime.

In light of this, how is it possible that California violated the Fourteenth Amendment simply by eliminating the narrow exception for racial discrimination that the Fourteenth Amendment tolerates, but does not require? The petitioners' only response is that while the State is, of course, free to enhance nondiscrimination protections with the effect of primarily benefiting *minorities and women* beyond the Fourteenth Amendment's floor, without either creating a racial classification or denying nonminorities their Fourteenth Amendment right of equal access to the political process, any nondiscrimination enhancement with the effect of benefiting *nonminorities* somehow violates the equal protection rights of minorities and women. Thus, petitioners' position is premised on the facially invalid notion that "minorities" and women have enhanced equal protection rights superior to those of all other "person[s]" protected by the Fourteenth Amendment. Under this view, while nonminorities have no equal protection right to be free of state constitutional amendments enhancing the nondiscrimination rights of others beyond the Fourteenth Amendment's floor, minorities and women alone do have such a right. (Indeed, under this interpretation of the Fourteenth Amendment, minorities and women, unlike nonminorities, have a right to petition for racially preferential discrimination against other citizens.)

It could not be clearer, however, that all persons have the same equal protection rights. *Adarand*, 515 U.S. at 229-30 (" '[T]he standard of review under the Equal Protection clause is not dependent on the race of those burdened or benefited by a particular classification.' ") (quoting *Croson*, 488 U.S. at 494 (plurality opinion)). Thus, since increasing the nondiscrimination protection for minorities and women is neither a racial classification nor subject to heightened scrutiny, this necessarily means that Proposition 209 is not either, since the group purportedly harmed or benefited by a law does not determine the level of Fourteenth Amendment

scrutiny or whether it is a racial classification. And, of course, even if "minorities" did have enhanced rights, this does not avail petitioners because the groups purportedly harmed by Proposition 209 constitute approximately *70%* of California's population.[6] 1990 U.S. Census, 90-PPL-1; *Croson*, 488 U.S. at 495-96.

In short, petitioners' argument necessarily rests on one of two facially meritless propositions: (1) the Fourteenth Amendment *always* prohibits states from enhancing non-discrimination protections above the protections contained in the Fourteenth Amendment itself, or (2) the Fourteenth Amendment permits such enhancement only if it benefits minorities and women, who have a unique equal protection right to prevent state efforts to end discrimination against others (and to lobby for discrimination in their favor). Under this view, of course, the *federal* legislature is disabled from forbidding public discrimination arguably permitted under the Constitution, since the most "remote level of government" possible cannot "shut the door" on minorities and women seeking to lobby San Francisco to enact such "constitutionally

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[6] Contrary to petitioners' assertion, however, the preference laws overturned by Proposition 209 often do discriminate against "protected groups" in petitioners' purported class, such as Asians and "nonminority" women, and sometimes aid white males. For example, the district court acknowledged that Asian "enrollments would *increase* by 15 to 25 percent" at the University of California if a race-neutral admissions policy is adopted. App. B29. Thus, under petitioners' incoherent theory, an Asian or nonminority woman who has been discriminatorily excluded by a racial preference program has his or her equal protection rights violated by Proposition 209's *abolition* of the program discriminating against them. Also, some California agencies set goals and timetables for *whites* in jobs where they are "underrepresented." Ed Mendel, *Affirmative Action Goal: More White Men*, San Diego Union-Tribune, Oct. 16, 1996, at A-1.

permissible" preferences.[7] Needless to say, neither this Court's decision in *Seattle* nor any other coherent constitutional principle supports these propositions.[8]

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[7] Thus, under petitioners' view, in *Taxman v. Board of Educ. of the Township of Piscataway*, 91 F.3d 1547, *cert. granted*, 117 S. Ct. 2506 (1997), the Court is *constitutionally compelled* to interpret Title VII to permit racial preferences to achieve "diversity" if, as petitioners' maintain, such "diversity" is a compelling governmental interest authorizing preferences under the Fourteenth Amendment. Pet. 10 n.7. Moreover, the 1991 Amendments to Title VII prohibiting all "race-norming," even in circumstances where such norming is purportedly necessary to achieve a compelling government interest, is violative of petitioners' view of the Constitution. 42 U.S.C. § 2000e-2. And, of course under this view, Congress, like the State of California, can *never* amend Title VII to end a regime of racial preferences.

[8] In any event, this is not an appropriate case for plenary review because, even if petitioners' legal reasoning is *entirely correct*, the district court's injunction is still impermissibly overbroad and directly contrary to this Court's well-established limits on *facial* challenges to state laws. It is settled that, in a facial challenge, petitioners "*must* establish that *no set of circumstances* exist under which [Proposition 209] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). This doctrine obtains with particular force to facial challenges to state laws that have not yet been interpreted by state courts. *See Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997). Petitioners and the district court *concede* that Proposition 209 is constitutional in some applications – insofar as it overturns preference programs violative of the Equal Protection Clause – and there is no finding or allegation that *all* (or a substantial majority) of California's extant preference programs satisfy the Fourteenth Amendment. *Cf. Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 895 (1992). Thus, the district court's injunction of *all* applications of Proposition 209 is legal error in a facial challenge and impermissibly overbroad. Similarly, both the district court and the petitioners acknowledge that, under *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), *repeal* of existing preference programs is constitutional, and the only flaw in Proposition 209 is that it "also prohibits the adoption of such programs in the future." App. B57; Pet. 21 n.15. The application of Proposition 209 to *current* preference programs is therefore constitutional and cannot be enjoined or the source of any potential injury to petitioners.

I. The Decision Below Is Fully Consistent With *Seattle* And *Romer* And Compelled by *Crawford*

According to petitioners, *Seattle* grants minorities and women, but only minorities and women, a constitutionally-guaranteed veto power over any substantive decision by the State that does not "inure primarily to [their] benefit," even if the substantive policy is fully consistent with – and indeed furthers – the Fourteenth Amendment's substantive principles. Pet. 18. Any state political decision, petitioners say, to eliminate such preferences or any other state policy that "inure[s] to the benefit of minorities," is, *ipso facto*, a racial classification. Pet. 19. Moreover, because such state policies, like *all* state policies, preempt contrary local laws, any state substantive decision *inherently* burdens the political process by rendering lobbying of local governments futile. Pet. 23-24. Petitioners thus seek to erect a discriminatory, dual political regime: minority groups have a right not only to veto state measures mandating nondiscrimination against others, but also to seek enactment of state and local measures mandating discrimination against others; nonminorities, however, are deprived of a right even to seek state measures legislating an end to discrimination against themselves.[9] Indeed, the law review article co-authored by petitioners' lead counsel, which they have cited repeatedly in their Ninth

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[9] Petitioners now agree it is "preposterous" to argue that minorities and women can veto any state measure that eliminates programs which allegedly inure to their benefit. Reply to CADAP's Opposition to Stay at 7 (filed Sept. 2, 1997 U.S.). They insist that they seek only to preserve minorities' equal political "opportunity" to seek racial preferences from local governments and state bureaucracies. But this "opportunity" is allegedly denied *solely because* the state has made a substantive decision contrary to the desires of racial preference proponents which, like *all* state constitutional (and legislative) provisions, preempts contrary decisions by inferior subdivisions within the state. Since petitioners are therefore asserting that any state decision requiring public bodies to "hurt" minorities denies minorities an "equal opportunity" to lobby inferior governments to "help" minorities, then they most assuredly are making the "preposterous" assertion that minorities and women can veto any state decision that "hurts" them.

Circuit briefs, quite candidly states that, under their interpretation of *Seattle*, minorities must win every "important political battle" at the state level:

> With respect to a given issue that is "racial in character," a state constitution may either remain neutral or prescribe norms *favorable* to racial minorities . . . But a state constitution can never entrench a substantive norm with respect to an issue that is "racial in character" in a direction that *disadvantages* a racial minority. For example, a constitution can *mandate* affirmative action, but it can *never* selectively prohibit it. . . . Vikram D. Amar & Evan H. Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. 1019, 1052 (1996) (emphasis added)

But see Seattle, 458 U.S. at 483.

As the Ninth Circuit correctly recognized, however, *Seattle* did not overturn decades of binding precedent and basic constitutional principles by mandating such uniquely *advantageous* treatment of *substantive* policies allegedly favored by minorities and women – particularly when the policy is violating the presumptive nondiscrimination rights of others. Quite to the contrary, *Seattle* prohibits only "uniquely *disadvantageous* treatment" that would "exclude particular racial groups from effective participation in the political *proces[s]*." *Id.* at 486 & n.30 (emphasis added) (internal citations omitted). Indeed, the *Seattle* opinion *itself* unequivocally rejected not only the precise result petitioners advocate – invalidation of state interference with local racial preferences – but also petitioners' basic analytic premise – that a state is disabled from making the same substantive decision on "racial issues" that local governments can freely make under the Fourteenth Amendment.

1. First, Justice Powell in his dissenting opinion in *Seattle* advanced, in almost identical terms, petitioners' understanding of the majority opinion and the parade of horribles that would necessarily ensue from this "strange" and "alien" principle. 458 U.S. at 495 (Powell, J., dissenting). Just like petitioners, Justice Powell maintained that the majority opinion held that the "heretofore undoubted supreme authority of the State's electorate is to be curtailed whenever a school board – or indeed any other state board or local instrumentality – adopts a race-specific program that arguably benefits racial minorities." *Id.* at 494. Moreover, as if specifically forecasting the adoption of Proposition 209, Justice Powell argued that the majority opinion could be misconstrued to invalidate statewide bans on affirmative action preferences by local agencies:

> After today's decision it is unclear whether the State may set policy in any area of race relations where a local governmental body arguably has done "more" than the Fourteenth Amendment requires. If local employment or benefits are distributed on a racial basis to the benefit of racial minorities, the State apparently may not thereafter ever intervene.

Id. at 498 n.14. *See* App. A31-A34. The majority explicitly disagreed, however, explaining that the dissent's interpretation "evidence[s] a basic misunderstanding of our decision. . . . [I]t is evident . . . that *the horribles paraded by the dissent, post*, at [458 U.S. at 499] n.14 – *which have nothing to do with the ability of minorities to participate in the process of self-government – are entirely unrelated to this case*." *Id.* at 480 n.23 (emphasis added). Petitioners nevertheless maintain that *Seattle* directly requires invalidation of a "state's" efforts to "intervene" in prior efforts to distribute "local employment or benefits" on a "racial basis" because such intervention has everything to do with "the ability of minorities to participate in the process of self-government."

Seattle also specifically rejected petitioners' basic submission that "every attempt to address a racial issue [by the state] gives rise to an impermissible racial classification." *Id.* at 485. Even more directly, the Court rejected petitioners' related assertions that they have a vested "constitutional right to local decision-making" on racial issues and that a "State's attempt to repeal a [local racial preference] program creates a racial classification, while 'identical action' by [a local government] does not." *Id.* at 480 n.23, 485 n.29. Petitioners cannot distinguish these dispositive statements by the *Seattle* majority opinion itself.[10]

2. Nor is proposition 209 in any way inconsistent with the general *Hunter/Seattle* test. As applied in *Seattle*, that test invalidates government action that is both (1) a "racial classification" and (2) "structures the *process* of decisionmaking" in a manner that imposes comparative burdens on racial groups. 458 U.S. at 485; *id.* at 480 n.23 (emphasis in original).

With respect to the threshold prong, all agree with the Ninth Circuit that *Seattle* does not reach "state action that

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[10] Petitioners suggest that *Seattle*'s straightforward endorsement of state interference with local racial preferences is actually endorsing such interference *only* if accomplished pursuant to petitioners' new-found methodology, i.e., eliminating racial and gender criteria by specifying all permissible nonracial and nongender-based criteria. Pet. 25. In addition to the fact that petitioners' new-found distinction makes no sense for the reasons set forth below, there is absolutely no language in *Seattle*'s majority or dissenting opinions which in any way supports petitioners' interpretation. Justice Powell did not hypothesize a state eliminating racial preferences without mentioning race, but considered the state's participation in any area of "race relations," including the state directly "intervening" to overturn local racial preferences. When the majority opinion said there was no problem with such state interference, there was no suggestion that the state could interfere with local racial preferences only if it accomplished this indirectly by prescribing a code of acceptable nonracial criteria.

addresses, in neutral fashion, race-related matters." App. A29 (quoting *Crawford*, 458 U.S. at 538). Proposition 209 is unquestionably just such state action, and is not a racial classification. "Rather than classifying individuals by race or gender, Proposition 209 *prohibits* the State from classifying individuals by race or gender." App. A21 (emphasis in original). Unlike the law at issue in *Hunter* and Initiative 350 in *Seattle*, Proposition 209 is not "an impediment to protection against unequal treatment but . . . an impediment to receiving preferential treatment." App. A35.[11] Since Proposition 209 simply outlaws programs that are "presumptively invalid

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[11] For essentially the same reason, *Romer v. Evans*, 116 S. Ct. 1620 (1996), is facially inapposite here. *Romer* struck down Colorado's Amendment 2 because it created political obstructions to equal treatment. App. A34-A25. As with *Seattle*, this prohibition cannot rationally be converted into condemnation of "political obstructions to preferential treatment." App. A35. There is no hint in *Romer* that the Colorado constitution was disabled from invalidating homosexual quotas or preferences by local governments. To the contrary, the Court went out of its way to emphasize that gays and lesbians were not seeking any "special rights." 116 S. Ct. at 1622.

In stark contrast to Amendment 2, Proposition 209 does not deny any group any "protection from discrimination" available to other groups. Pet. 26. To the contrary, petitioners' complaint is that Proposition 209 grants other groups the *same* protection from discrimination that petitioners enjoy – a blanket prohibition on race and gender-based preferences in all circumstances. Thus, petitioners are indeed seeking "special rights": the right to veto, and be exempted from, any statewide effort to forbid local public entities from granting any person a racial advantage, although the state concededly can and has outlawed such advantages for all others. Indeed, it is only the injunction sought by petitioners that would violate *Romer*. For such an injunction would affirmatively prohibit males and "nonminorities" from seeking protection against discrimination by local governments from the state legislature or state constitution, since those are more "remote levels of government." Such an injunction would therefore "make it more difficult for one group of citizens than for all others to seek aid from the government" and would prohibit "government and *each* of its parts [from] remain[ing] open on impartial terms to all who seek its assistance." *Romer*, 116 S. Ct. at 1628, *quoted in* Pet. 26 (emphasis added).

racial classifications," it cannot itself be a "presumptively invalid racial classification." *Crawford*, 458 U.S. at 528.

Petitioners offer two responses to this unanswerable logic. First, under *Seattle*, a state law which prohibits racially preferential treatment is no different than a law which prohibits equal treatment. Both are racial classifications because preference programs, like nondiscrimination laws, "inure primarily to the benefit of racial minorities" and *any* law which eliminates such benefits is a racial classification. Pet. 23 (quoting *Seattle*).[12] Second, *Seattle* holds, albeit silently, that laws which "selectively" prohibit distinctions on the basis of race are racial classifications unless they also prohibit all other classifications on all other bases. Pet. 25. Otherwise, a California citizen seeking preferential admission to a state university on the basis of his skin color is in a worse position than a California citizen seeking preferential admission on the basis of, say, "California residence." App. B48.

If either of these propositions is true, Proposition 209 is most assuredly unconstitutional. But, of course, so is the *current* equal protection clause of the California Constitution and all state Equal Rights Amendments, as well as Title VI and Title VII of the 1964 Civil Rights Acts. All "selectively" condemn racial and gender preferences, but are wholly silent on (or affirmatively authorize) preferences on other bases – thus "denying" minorities and women an equal opportunity to seek race-based preferences from local governments. Petitioners are forced to concede, however, that federal civil rights laws and state Equal Rights Amendments may so "shut the door" on state and local governments using racial or gender preferences in any circumstances, and that state and

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[12] Indeed, according to petitioners, laws requiring racial preferences are constitutionally *superior* to nondiscrimination laws. Thus, while California (as the state legislature has done) may *mandate* that San Francisco adopt (constitutionally permissible) racial preferences without any difficulty under *Seattle*, it may not *forbid* racial preferences because that is an impermissible racial classification under *Seattle*.

local laws may outlaw such preferences by, respectively, state and local governments. They are therefore wholly unable to explain how these permissibly "neutral" prohibitions against only racial and gender preferences can become impermissible "racial classifications" simply because they are embodied in the state constitution, rather than in superior federal law or inferior law within the state.

Moreover, while petitioners confidently proclaim that *Seattle* invalidated state prohibitions on racially preferential treatment, they point to nothing in the opinion which suggests that extraordinary result. To the contrary, the *only* identified evil in the Washington initiative was that it subjected minorities to disparate treatment on the basis of race. The initiative proponents in Washington could not, of course, maintain that they were opposed to racially integrated schools as such, and thus asserted that the initiative was premised on race-neutral opposition to the problem of transporting children beyond their neighborhood school. *Seattle* rejected this explanation, however, solely because the initiative treated racially beneficial integrative busing *worse* than busing for "virtually any other purpose." *Seattle*, 458 U.S. at 471.[13] While the purportedly nonracial problem addressed by Seattle's Initiative 350 was transportation beyond the neighborhood school, this distant transportation became a "problem" only when it benefited minority students seeking an integrated education. Under standard discriminatory treatment analysis, therefore, the *Seattle* Court inferred that Initiative 350 was "effectively drawn for racial purposes" and " 'because of' . . . its adverse effects upon busing for integration," not out of any race-neutral devotion to neighborhood schools. *Id.* at 471 (quoting

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[13] *See id.* at 471 (initiative "carefully tailored to interfere only with desegregation busing"); *id.* at 473-75. *See also Seattle School Dist. v. Washington*, 633 F.2d 1338, 1343-44 (9th Cir. 1980) ("Initiative 350 embodies a constitutionally-suspect classification based on racial criteria because it legislatively differentiates student assignment for purposes of achieving racial balance from student assignment for any other significant reason.")

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)). *See, e.g., Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977) (discriminatory purpose may be inferred where "factors usually considered important by the decisionmaker strongly favor decision contrary to the one reached."). While there are legitimate, nonracial justifications for reducing educational funding, if a legislative measure reduced funding *only* for integrated schools, it would clearly be a racial classification. *Seattle* held that denying transportation *only* to integrated schools is also "designed to accord disparate treatment on the basis of racial considerations." *Id.* at 485.[14] Thus, *Seattle* does not hold that states may not eliminate integrative busing because busing is a "racial issue" (a holding impossible to square with *Crawford*), but only that government may not engage in disparate treatment on the basis of race.

Apparently recognizing this, petitioners desperately attempt to suggest that minorities and women in California suffer unequal treatment similar to that visited upon black school children in Washington because Proposition 209 prohibits differential treatment on the basis of race, but not differential treatment on the basis of all other potential criteria. Proposition 209, however, obviously does not treat minorities and women worse than other groups, it simply treats racial discrimination worse than other classifications. As the Ninth Circuit correctly noted, this is obviously not contrary to the Fourteenth Amendment since the *Fourteenth Amendment*

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[14] Moreover, far from suggesting that integrative efforts were analogous to presumptively unconstitutional racial preferences, *Seattle* assumed, because it was wholly uncontested, the "propriety of race-conscious student assignments for the purpose of achieving integration, even absent a finding of prior *de jure* segregation." 458 U.S. at 471 n.15. Incredibly, petitioners seek to twist the Court's acknowledgment of the undisputed "propriety" of integrative busing into an unspoken conclusion that such busing raised constitutional concerns analogous to racial preferences. App. B47; Pet. 23.

itself treats racial preferences differently from all other preferences. As the *Seattle* Court itself repeatedly emphasized, racial discrimination is a "special condition" deserving of special condemnation. 458 U.S. at 486. State and federal governments always have been free to single out racial discrimination for special condemnation, regardless of whether that condemnation is coupled with elimination of inoffensive or beneficial preferences based on "leadership ability . . . California residence . . . educational disadvantage, family income . . . age . . . handicap." App. B28, B48. App. F6.

To be sure, the principal effect of Proposition 209's blanket condemnation of racial discrimination is to eliminate affirmative action preferences. But this is simply a concomitant of the fact that this is virtually the only form of racial discrimination by public entities that is permissible in any circumstance. The fact that the State has chosen to eliminate the one remaining *exception* to its regime of racial neutrality hardly suggests that it is imposing a "*comparative* burden" on minorities or not addressing "in neutral fashion, race-related matters." *Seattle*, 458 U.S. at 485; *Crawford*, 458 U.S. at 538. To the contrary, racial minorities and women are treated precisely the same as all other groups in California. After Proposition 209, no person in California, minority or nonminority, can successfully lobby any government, state or local, for preferences based on their racial group membership or gender. Conversely, all persons in California, minority or nonminority, can successfully lobby any government for preferences based on all other criteria. Notwithstanding this obviously "neutral" treatment of minorities and women, petitioners maintain that they have "selectively" been discriminated against because they are not "selectively" *exempted* from Proposition 209's blanket ban on discrimination and have suffered a "comparative" disadvantage because they, like all other Californians, are *equally* disabled from successfully lobbying local governments for racial preferences. As the Ninth Circuit aptly noted, "[i]f merely stating

this alleged equal protection violation does not suffice to refute it, the central tenet of the Equal Protection Clause teeters on the brink of incoherence." App. A19-A20.

Thus, there is simply nothing to petitioners' bizarre suggestion that laws eliminating racial discrimination must, in contrast to Title VII, *eliminate* "management prerogatives . . . to the greatest extent possible" by "specifying particular admission criteria" for all contracting, employment and education decisions by every unit of California government. *United Steelworkers v. Weber*, 443 U.S. 193, 206 (1979) (internal citations omitted); Pet. 25. We note additionally that engrafting such a bizarre requirement on civil rights laws does not even make sense from *petitioners'* perspective. A statewide ban on *all* preferences, *including* racial and gender preferences, would just as tightly "lock shut" the "breathing space" of local governments to grant racial and gender preferences – the alleged constitutional flaw in Proposition 209. Moreover, depriving a minority woman of the ability to seek preferences on the basis of her "low family income . . . educational disadvantage . . . California residence . . . or handicap" would simply *exacerbate* this "deprivation" and would eliminate a host of preferences that disproportionately *benefit* minorities and women.[15]

3. Finally, this Court's decision in *Crawford* directly refutes petitioners' assertion that state constitutions impose racial classifications whenever they eliminate programs that "inure primarily to the benefit of minorities" unless they also eliminate "analogous" nonracial benefits for other groups.

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[15] Moreover, petitioners elsewhere state that *Romer* prohibits state constitutions from denying *any* group, such as homosexuals, the ability to seek preferences from local government because such preferences constitute part of the "protection from discrimination" that *Romer* said state constitutions could not eliminate. Pet. 27. Thus, petitioners simultaneously assert that (1) to satisfy *Seattle*, state constitutions must bar all potential local preferences for all groups if they eliminate racial preferences and (2) to satisfy *Romer*, state constitutions may not bar any local preferences for any groups.

Crawford upheld the popularly-enacted constitutional amendment, Proposition 1, eliminating the California constitution's *de facto* busing requirement. Since court-ordered *de facto* busing "inures primarily to the benefit of minorities," *Crawford* definitively establishes that petitioners are flatly wrong when they contend that the elimination of such benefits are impermissible racial classifications under the first prong of the *Hunter/Seattle* test. *See also Seattle*, 458 U.S. at 485. Rather, the test is simply whether the state constitution "addresses, in neutral fashion, race-related matters," which Proposition 209 plainly does since its benefits are "made available regardless of race" and it "neither says nor implies that persons are to be treated differently on account of their race." *Crawford*, 458 U.S. at 537, 538. Proposition 209 is a "simple . . . modification of . . . antidiscrimination laws" to eliminate the loophole for affirmative action preferences and such modifications "never ha[ve] been viewed as embodying a presumptively invalid racial classification." *Id.* at 539.

More directly, *Crawford* expressly rejects petitioners' notion that elimination of racial "benefits" (equitable judicial remedies for *de facto* school segregation) must be coupled with elimination of analogous benefits in the nonracial context (equitable remedies for other constitutional violations). As the Court noted, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.* at 541-42 (quoting *Tigner v. Texas*, 310 U.S. 141, 147 (1940)). Similarly, "a 'dual constitution' is not established when the State chooses to go beyond the requirements of the Federal Constitution in some areas but not others." *Id.* at 542 n.28. Thus, California is permitted to "go beyond the requirements of the Federal Constitution" by banning all racial preferences without also banning preferences for "others," particularly since the "differences in fact" between racial and other preferences is constitutionally compelled and much starker than the differential remedies in *Crawford*.

Moreover, as even petitioners concede, *Crawford* clearly authorizes all subsequent constitutional amendments to overturn the "California Supreme Court's . . . interpretation of the state's equal protection clause," because the *Crawford* Court "would not interpret the Fourteenth Amendment to require the people of a State to adhere to a judicial construction of their State Constitution when that Constitution itself vests final authority in the people." Pet. 21 n.15; *Crawford*, 458 U.S. at 540. Here, as in *Crawford*, Proposition 209 simply overturns the California Supreme Court's interpretation of the state equal protection clause as permitting racial preferences in some circumstances (notwithstanding that clause's plain language and persuasive dissenting opinions). *See Price v. Civil Serv. Comm'n*, 604 P.2d 1365 (Cal.), *cert. dismissed*, 449 U.S. 811 (1980); *id.* at 1383-91 (Mosk, J., dissenting); *DeRonde v. Regents of the Univ. of California*, 625 P.2d 220 (Cal.), *cert. denied*, 454 U.S. 832 (1981); *id.* at 229-36 (Mosk, J., dissenting).

According to petitioners, *Crawford* upheld Proposition 1 because it was a mere "repeal" pursuant to which "[s]tate and local governments remained free voluntarily to adopt race-conscious busing" and thus left the political process untouched. Pet. 21 n.15. However, the effect of Proposition 1 on the political process – whatever its significance – necessarily relates only to the *second* prong of the *Hunter/Seattle* test, i.e., whether the political process has been reordered.[16] It

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[16] In any event, *Crawford* in no way supports petitioners' bizarre suggestion that the state may only "repeal" *existing* extra-constitutional benefits, but is somehow foreclosed from *prospectively* eliminating precisely the same programs if enacted the next day. To the contrary, both *Crawford* and *Seattle* held that it was constitutionally irrelevant whether the "benefit" being overturned post-dates or "predates that taken by the State" since the invalidated program was "not required by the Federal Constitution in the first place." *Seattle*, 458 U.S. at 480 n.23; *Crawford*, 458 U.S. at 538. Were it otherwise, a state constitution could repeal all existing programs, state agencies or municipalities could immediately re-enact the same programs again, and this absurd tug-of-war could continue

inherently can say nothing about whether the initiative is a "racial classification," the prerequisite essential to even "trigger application of the *Hunter* doctrine." *Seattle*, 458 U.S. at 474. If, as petitioners maintain, all state constitutional provisions eliminating programs beneficial to minorities are "racial classifications," the *Crawford* Court would have found that Proposition 1 created a racial classification and then explained that this nonetheless had no effect on the political process, but merely on the judicial process for ordering *de facto* busing. *Crawford*, however, explained that Proposition 1 was not a "racial classification" because it did not "allocate governmental *or judicial power* on the basis of a discriminatory principle." 458 U.S. at 528 (emphasis added). And, of course, whether an initiative retroactively repeals, or prospectively proscribes, certain policies cannot possibly affect whether it has a "racial focus." *Seattle*, 458 U.S. at 472.

4. With respect to the second prong of the *Hunter/Seattle* test, Proposition 209 is nothing more than a substantive change in the State's policy concerning the permissibility of racial preferences. Far from restructuring the political process to impose a burden on minorities, Proposition 209 has no effect on the political process at all. On the most basic level, Proposition 209 does not mention the political process, so all the same methods for enacting laws, or lobbying therefor, continue to exist in precisely the same form after Proposition 209.[17] Nor has the State reallocated political authority in

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ad nauseum in perpetuity. Thus, *Crawford* simply makes the obvious point that "repeal or modification" of racially beneficial laws may not be accompanied by "something more" that *violates* the Constitution; i.e., explicitly changing the political process for minorities, as in *Hunter v. Erikson*, 393 U.S. 385 (1969), or authorizing discrimination, as in *Reitman v. Mulkey*, 387 U.S. 369 (1967). *Crawford*, 458 U.S. at 538 n.20, 541. Finally, petitioners' entire claim of extant injury is premised on the harm caused by Proposition 209's *repeal* of *existing* programs – which even they concede is constitutional under *Crawford*.

[17] For this reason, *Hunter* is entirely irrelevant here. In *Hunter*, an amendment to the City Charter directly burdened the political process by

a discriminatory manner. *Seattle*, 458 U.S. at 470. In enacting Proposition 209, California simply made a substantive decision to "prohibit[ ] all race and gender preferences by state entities." App. A34. This substantive policy change is obviously not a change in the level of government or the "political process or the decisionmaking mechanism used to *address* racially conscious legislation." *Seattle*, 458 U.S. at 485 (emphasis in original). Like virtually every other state, permissible use of racial and gender discrimination by local and state agencies has *always* been governed by the California Constitution, in its equal protection clause and elsewhere. *See* Cal. Const. art. I, §§ 7, 8. Proposition 209 simply eliminates the narrow exception for such racial preferences previously authorized by the California Supreme Court.

Thus, while *Seattle*'s Initiative 350 reordered the political process by transferring decisionmaking authority over *de facto* busing from the School Board to the "new and remote level of" the State Legislature, Proposition 209 simply changed the *State*'s pre-existing substantive policy by "prohibit[ing] all racial and gender preferences by state [and local] entities." *Seattle*, 458 U.S. at 483; *id.* at 482 n.25. Thus, Proposition 209 is plainly a "simple change in policy"

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enacting a "double vote" requirement under which fair housing legislation – and only fair housing legislation – would become law only if a majority of the City Council *and* a majority of voters agreed. *See Crawford*, 458 U.S. at 541 (discussing the *Hunter* Amendment: "[W]hereas most ordinances regulating real property would take effect once enacted by the City Council, ordinances prohibiting racial discrimination in housing will be forced to clear an additional hurdle."). *Hunter* quite sensibly held that requiring only black citizens to win two votes before garnering favorable legislation was no more constitutional than requiring black citizens alone to take two driving tests before securing a license. It was this direct manipulation of the political and lawmaking process through an explicit racial classification that imposed the discriminatory racial burden condemned in that case. 393 U.S. at 393.

on racial matters that *Seattle* explicitly endorsed, rather than a "forbidden reallocation of power." 458 U.S. at 476.[18]

5. Of course, if *Seattle* is construed, notwithstanding all of the above, to disable states from ever eliminating public racial preferences, it would be irreconcilable with *Crawford*, the Court's subsequent decisions establishing nonminorities' equal rights under the Fourteenth Amendment and the legion of cases establishing that a state may require its subordinate entities to take any action consistent with the Constitution. Thus, should the Court grant *certiorari*, and determine that *Seattle* does mandate the bizarre result urged by petitioners, it should reverse *Seattle*.

II. A State Constitution's Imposition Of Racial And Gender Neutrality On State And Local Governments Is Not Preempted By Either Title VII Or The Fourteenth Amendment

Petitioners devote the bulk of their brief to establishing that both Title VII and the Fourteenth Amendment permit racial preferences in narrow circumstances and that this grants public entities certain flexibility to deal voluntarily with the competing demands of minorities and nonminorities regarding such preferences, free from federal judicial litigation. While some justices have indeed noted the desirability of granting states some discretion to make their own determinations on racial preferences, free from federal judicial

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[18] Petitioners do not even attempt to refute this dispositive distinction, presumably because they recognize it is irrefutable. *See* Caminker, *Equal Protection, Unequal Political Burdens, and the CCRI*, 23 Hastings Const. L.Q. at 1046 ("On its face [Proposition 209] looks more like a mere change of policy rather than a direct attempt to reallocate political power within the state. Unlike the Akron Charter Amendment and [*Seattle*'s] Initiative 350, [Proposition 209] does not directly declare that it is withdrawing political authority from one government level and vesting it solely in a higher one.").

interference,[19] this obviously cannot, contrary to petitioners' assertion, supply a rational basis for the federal judiciary to eliminate the state's discretion to make its own determinations concerning racial preferences. Rather, as Justice Kennedy has noted, it is precisely because of the due regard owed the "constitutional responsibilities of the political branches" that the "Fourteenth Amendment ought not to be interpreted to reduce a state's authority in this regard, unless, of course, there is a conflict with federal law or a state remedy is itself a violation of equal protection." *Croson*, 488 U.S. at 518 (Kennedy, J., concurring). Amazingly, under petitioners' inscrutable logic, unelected federal judges can best *enhance* states' autonomy over racial preferences by interpreting the Fourteenth Amendment to "reduce a state's authority in this regard" and by finding that a state law is preempted even if it is *not* in "conflict with a federal law" such as Title VII and even if it is *not* "itself a violation of equal protection." Contrary to petitioners' suggestion, however, the federal judiciary is authorized to invalidate only laws that conflict with the Fourteenth Amendment or Title VII; it has no warrant to choose for the state which of the permissible compliance options are "preferable" or which inferior subdivision within the state should make that determination. Pet. 29. It certainly cannot do so in the name of *deferring to* state autonomy.

In enacting Proposition 209, California *has* exercised *its* "discretion" to determine for itself the desirability of racial preferences and concluded that such preferences are not narrowly tailored to any interest it deems compelling or important. Since this voluntary decision concededly complies with the substantive commands of the Fourteenth Amendment and Title VII, this law cannot be invalidated by the federal courts

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[19] *But see Croson*, 488 U.S. at 513-14 (Stevens, J., concurring) ("It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed.")

in the name of securing "voluntary compliance" with those provisions.

Consequently, petitioners are forced to concede that state legislatures may prohibit state agencies from using racial preferences and municipal laws may do the same for municipal governments, without in any way running afoul of the "policy" of encouraging voluntary compliance with Title VII and the Fourteenth Amendment. Pet. 16, 24, 25. Nevertheless, petitioners seem to be arguing that if precisely the same command is imbedded in the state constitution, it somehow becomes contrary to these "policies" and is thus "preempted" by Title VII and the Fourteenth Amendment. But if state or municipal statutes can eliminate preferences without conflicting with the voluntary compliance policies of Title VII and the Fourteenth Amendment, it is quite impossible for a state constitutional provision eliminating such preferences to be in conflict with those federal laws. The question whether an inferior law conflicts with the Constitution or a federal statute, or their broader "purposes," cannot possibly be affected by the *level* of state government at which the law is enacted. In this regard, as the district court correctly noted, state constitutions stand in precisely the same shoes as inferior state laws. App. B64 n.37. Thus, even assuming the level of state government at which a law is enacted affects "political participation rights" under *Seattle* (by rendering lobbying of local governments futile), it inherently says nothing about whether that law conflicts with a *superior* federal law.

In short, petitioners seek to convert this Court's desire to give state and local governments some leeway to resolve the racial preference issue, without unnecessary intrusion by federal courts, into a federal judicial *command* that local governments must have absolute discretion to resolve this issue free from interference by the *state constitution*. Needless to say, however, neither inferior municipal governments nor the federal judiciary may override the state constitution's determination concerning whether such municipalities have a sufficient "interest" in discriminating against California citizens. Local

California governments, created by the people of California through the state constitution, have no power to resist the constitutionally permissible decisions of their creators. Rather, "ultimate control of every state-created entity resides with the State, for the State may destroy or reshape any unit it creates." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994).[20] Indeed, "the essence of our federal system is that within the realm of authority left open to them under the Constitution, the *States* must be equally free to engage in *any activity that their citizens choose* for the common weal, no matter how unorthodox or unnecessary anyone else – *including the judiciary* – deems state involvement to be." *Garcia*, 469 U.S. at 546 (emphasis added).

As this quote implies, it is even more obvious that the federal judiciary may not substitute its judgment for California citizens on whether they have an "interest" in having their government discriminate against them – regardless of whether petitioners believe that this may save California burdensome litigation. As the Ninth Circuit noted, "[I]f the federal courts were to decide what the interests of the people are in the first place, judicial power would trump self-government as the general rule of our constitutional democracy." App. A37-A38. *See also Missouri*, 515 U.S. at 113 (O'Connor, J., concurring) ("Federal courts . . . must always observe their limited judicial role," particularly "where States historically have been sovereign") (internal citations omitted). Indeed, even if the state defends a program of racial or gender discrimination, federal courts will not *accept* a purported justification unless

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[20] *See also Seattle*, 458 U.S. at 476 ("States traditionally have been accorded the widest latitude in ordering their internal government processes and school boards, as creatures of the States, obviously must give effect of policies announced by the state legislature."); *id.* at 480 n.23; *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 672-73 (1976); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985) (Blackmun, J.); *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933).

it actually motivated a state at the time of enactment. *Shaw v. Hunt*, 116 S. Ct. at 1902-03; *Miller v. Johnson*, 115 S. Ct. 2475, 2490 (1995); *United States v. Virginia*, 116 S. Ct. 2264, 2275 (1996). It necessarily follows that the state is not required to advance an interest that it expressly disavows. Even petitioners agree that it is not "exclusively the province of the federal judiciary to decide when, if, and how corrective measures are to be instituted." Pet. 30. While petitioners believe that this is the exclusive province of *local* governments, as guaranteed by the federal courts, it is in fact exclusively the province of the state, unless the state decides to delegate such power to local governments. As *Croson* noted, a "local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction" only "*if delegated the authority from the State.*" *Croson*, 488 U.S. at 491-92 (emphasis added).

In any event, even if the state constitution was not entirely free to impose on its inferior entities policies that concededly are not "preempted" by Title VII if voluntarily enacted by those inferior entities themselves, it is quite clear that Proposition 209 is not preempted because it is consistent with both the "purposes" and commands of Title VII.[21] The

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[21] Petitioners argue that Section 1104 of the 1964 Civil Rights Act, in addition to Section 708, also governs Title VII preemption law and that Section 1104 proscribes any state law that is "inconsistent with the purposes of the Act." However that may be, the Court in *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), squarely held that "[i]n *two* sections of the 1964 Civil Rights Act, §§ 708 *and 1104*, Congress has indicated that *state laws will be preempted only if they actually conflict with federal law*." *Id.* at 281 (emphasis added). *See id.* at 295-96 (Scalia, J., concurring). The *Guerra* Court therefore upheld California's pregnancy preference law because it did not "prevent employers from complying with both the federal law (as petitioners construe it) and the state law." *Id.* at 290-91. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983). Thus, *Guerra* squarely held that laws which do not "prevent compliance" with Title VII are neither "inconsistent with" nor otherwise in conflict with that statute, and thus are not preempted. In any event, as the court below also

United States, which enforces Title VII, conceded this below. Brief of the United States at 42 (filed Feb. 21, 1997).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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correctly noted, Proposition 209's overturning of policies mandating racial preferences cannot be "inconsistent" with the "purposes" of Title VII since Title VII expressly says that its purpose is not to "grant preferential treatment to any individual or to any group because of the race. . . . " 42 U.S.C. § 2000e-2(j). *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981) ("Title VII does not demand that an employer give preferential treatment to minorities and women.").